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IN THE

Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON,
Petitioner,

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Weldon Bruce Dayton respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on October 24, 1957, affirming a summary judgment of the United States District Court for the District of Columbia against petitioner in an action to declare petitioner's entitlement to a passport and to enjoin the Secretary of State from denying petitioner a passport.

Opinions Below

The opinions in the Court of Appeals (R. 291-303) have not yet been reported; they are reproduced in Appendix C, *infra*. The opinion of the District Court (R. 280-289) is reported at 146 F. Supp. 876.

Jurisdiction

The judgment of the Court of Appeals was entered on October 24, 1957 (R. 304; Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the denial of a passport to petitioner, a citizen of the United States, by the Secretary of State (hereinafter "the Secretary"), on the basis of information disclosed neither to petitioner nor to the courts, violates the due process clause of the Fifth Amendment.

2. Whether such passport denial on the stated criteria—that the Secretary has reason to believe that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and "because the issuance of a passport would be contrary to the national interest"—violates petitioner's rights to substantive due process under the Fifth Amendment.

3. Whether such passport denial is grounded on the doctrine of "guilt by association" and so violates petitioner's rights under the First and Fifth Amendments.

4. Whether such passport denial and the Secretary's passport regulations (22 C.F.R. 51.135-51.170; hereinafter "the Passport Regulations"), as applied to petitioner, abridge petitioner's First Amendment rights of speech, belief and association; constitute a bill of attainder and *ex post facto* legislation, in violation of Article I, section 9 of the Constitution; and unlawfully deprive petitioner of his rights of travel and to due process, in violation of the Fifth and Ninth Amendments to the Constitution.

5. Whether the Passport Regulations are invalid because they are not authorized by Congress and because they conflict with the Congressional intent in pertinent statutes, *viz.*, the Internal Security Act of 1950, § 6, 64

Stat. 987, 993, 50 U.S.C. 785; the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U.S.C. 212; and the Expatriation Act of 1868, 15 Stat. 223, R.S. § 1999.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are Article I, sections 8(3) and 9(3); and the First, Fifth and Ninth Amendments to the Constitution. The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U.S.C. 211a; the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U.S.C. 212; the Immigration and Nationality Act of 1952, § 215, 66 Stat. 163, 190, 8 U.S.C. 1185; the Internal Security Act of 1950, § 6, 64 Stat. 987, 993, 50 U.S.C. 785; and the Expatriation Act of 1868, 15 Stat. 223, R.S. § 1999. The statutory provisions are set forth in Appendix A, *infra*, pp. 22-24. The pertinent provisions of the Passport Regulations (22 C.F.R. 51.135-51.170) are set forth in Appendix A, *infra*, pp. 24-32.

Statement of the Case

On March 5, 1954, petitioner, a native-born citizen of the United States and a physicist by education and training, filed an application for a passport to enable him to travel to Bombay, India, there to accept a position offered as research physicist at the Tata Institute of Fundamental Research (R. 6, 12, 24-28, 70-72).

On April 14, 1954, the Director of the Passport Office advised that the passport application was being denied because the Department of State "feels that it would be contrary to the best interest of the United States to provide you passport facilities at this time" (R. 10). Thereupon, petitioner conferred with an officer of the Passport Office; fully responded to his numerous inquiries; and, upon the latter's request, executed a detailed affidavit, containing a full statement of the mat-

ters about which inquiry had been made (R. 6, 10-42). In that affidavit, petitioner averred, *inter alia*, as follows (R. 12):

> "I am not now and I have never been a member of the Communist Party.
>
> "With the possible exception of a casual and brief association with the work of the Joint Anti-Fascist Refugee Committee for a few months in 1941 and in 1942 (all as related below); I am not now and never have been a member of any of the organizations designated on the Attorney General's list (which I have carefully examined).
>
> "I am not now engaged and I have never engaged in any activities which, so far as I know or at any time knew, support or supported the Communist movement.
>
> "I wish to go abroad for the sole purpose of engaging in experimental research in physics at the Tata Institute of Fundamental Research in Bombay. I am not going abroad to engage in any activities which, so far as I know or can imagine, will in any way advance the Communist movement."

On June 24, 1954, the Director of the Passport Office advised that "in view of certain factors of . . . [petitioner's] case which I am not at liberty to discuss with him, the Department must adhere to its previous decision that it would be contrary to the best interests of the United States to provide . . . passport facilities at this time" (R. 42-43). Some months thereafter, the Director notified petitioner that (R. 44):

> "In arriving at its decision to refuse passport facilities . . . , the Department took into consideration his connection with the Science for Victory Committee and his association at that time with various communists. However, the determining factor in the case was . . . [petitioner's] association with persons suspected of being part of the Rosenberg espionage ring, and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government."

On November 8, 1954, in accordance with the Passport Regulations, petitioner filed a petition of appeal with the Board of Passport Appeals of the Department of State (R. 44-47). Responding only partially to petitioner's request for particulars (R. 45-47), that Board replied that the State Department's file (R. 49):

> " . . . contains information indicating that . . . [petitioner] was present at 65 Morton Street, New York City in the summer of 1949 (July or August) and at Apartment 61, 65 Morton Street, New York City, during the month of January 1950. The . . . [petitioner's] relationship, if any (past or present), with the following-named persons is considered pertinent to the Board's review and consideration of the case: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz, Karl Sitte, Louis S. Weiss, Alfred Sarant, and William Perl."

Hearings were subsequently held before a panel of the Board, at which testimony of petitioner and witnesses called by him and by the State Department [1] was adduced and documentary evidence received (R. 58-270).

On September 7, 1955, the Acting Secretary of State advised petitioner that the Board had submitted its recommendation to the Secretary and that, after "a review of the entire record and on the basis of all the evidence, including that contained in confidential reports of investigation", the Secretary had denied petitioner's passport application "under Section 51.135 of the Passport Regulations" (R. 4-5).

Petitioner thereupon filed a complaint in the District Court, requesting (1) a judgment declaring that he was entitled to a passport and that the Passport Regulations

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[1] The testimony of the Department's witnesses was limited to a single aspect of the charges against petitioner: that he was present on several occasions in a New York apartment building (R. 171-270; see *infra*, pp. 7-8)

are unlawful, and (2) an injunction enjoining the Secretary from continuing to deny petitioner a passport and directing the Secretary forthwith to issue such a passport (R. 1-5). On appeal from the District Court's grant of summary judgment for the Secretary (R. 56-57), the Court of Appeals reversed and directed remand of the case to the Secretary for reconsideration in accordance with the rules laid down in the Court's prior decision in *Boudin* v. *Dulles*, 98 U.S. App. D.C. 205, 235 F.2d 532. *Dayton* v. *Dulles*, 99 U.S. App. D.C. 47, 237 F.2d 43.

On October 4, 1956, after reconsideration, the Secretary signed a document designated "Decision and Findings" (R. 275-278), denying petitioner's passport application "under Section 51.135(c) of the Passport Regulations[2] . . . *and* because the issuance of a passport would be contrary to the national interest" (R. 278; emphasis supplied). The Secretary's findings, based, in part, on evidence in the open record and, in part, on undisclosed information allegedly in the State Department files, were grouped in four categories, as follows (R. 276-277):

> 1a. On the basis of the open record: Petitioner was active in the Science for Victory Committee while at the University of California during 1943-1944, serving as chairman during much of that period. As chairman, he associated with Frank and Sandra Collins and Rose Segure, who had been instrumental in organizing the Committee.
>
> b. Confidential information in the State Department files "indicates" that the Committee "was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association" with petitioner and the Committee.
>
> [The Secretary does not find or suggest that petitioner had any knowledge of the Communist origin,

[2] Section 51.135(c) of the Passport Regulations is set forth at Appendix A, *infra*, p. 25.

if such there was, of the Science for Victory Committee or of the Communist membership of the three persons named. To the contrary, petitioner's undisputed testimony is that, to his knowledge, the Committee had no relationship whatever with the Communist Party (R. 83) and that none of the persons named or any others active in the organization were Communist Party members (R. 79-81, 92-93).]

2a. On the basis of the open record: During the period 1946-1950, at Ithaca, New York, petitioner maintained a close association and relationship with Alfred Sarant. At petitioner's invitation, Sarant and his wife lived in petitioner's house for a period of eight months in 1947-48, pending completion of the Sarant home next door; and, thereafter, petitioner and Sarant were neighbors until July, 1950. In July, 1950, Sarant became the subject of intensive interrogation by the F.B.I. About a week thereafter, Sarant left Ithaca and subsequently entered Mexico with petitioner's then wife.

b. Confidential information in State Department files "establishes" that Sarant "was an active member of the Communist Party; that he admitted said membership during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg".

[Again, the Secretary neither finds nor suggests that petitioner had any knowledge of Sarant's membership in the Communist Party or involvement with Rosenberg. To the contrary, petitioner's undisputed testimony is that he never knew Sarant to be engaged in Communist or espionage activities (R. 154-155).]

3a. On the basis of the open record: Petitioner was present "during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6-I".

b. Confidential information in State Department files "indicates" that Sarant's New York City apartment "was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power."

[Petitioner has repeatedly and consistently denied—to F.B.I. agents, in affidavits filed with the Government, and in sworn testimony before grand juries and in the State Department—that he has ever set foot in the Morton Street apartment building (except on one occasion, in June, 1951, when he accompanied F.B.I. agents, at their request, to that address) (R. 32, 103, 133-134, 269-270). The Secretary does not find or suggest that petitioner had any knowledge of the uses to which the Sarant apartment in that building was allegedly put.]

4a. On the basis of the open record: Since 1938, petitioner has maintained a close association and relationship with Bernard Peters, who was responsible for petitioner's offer of employment at the Tata Institute in Bombay, where petitioner desires to work in close collaboration with Peters.

b. Confidential information in State Department files "indicates" that Peters "has held membership in the Communist Party outside the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent."

[The Secretary neither finds nor suggests that petitioner knew of Peters' membership in the Communist Party or Communist activities, if such there were. To the contrary, petitioner's testimony was that, based on their long and close friendship, he was convinced that Dr. Peters was not a Communist (R. 16, 80, 150, 151).]

From the foregoing findings, "together with the confidential information relating thereto, *as well as other confidential information contained in the files of the Department of State* . . .", the Secretary concluded that he had "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement" (R. 278; emphasis supplied). The Secretary stated that the confidential information relating to the four enumerated findings "relates to the internal security of the

United States" and that disclosure of its sources and details would "be detrimental to our national interest by compromising investigating sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security . . . [and] would have an adverse affect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area" (*ibid.*). Disclosure of the other confidential information relied on, the Secretary said, "might . . . prejudice the interest of United States foreign relations" (*ibid.*).

On resubmission of the case to the District Court, a summary judgment was again granted for the Secretary (R. 289-290; see R. 280-289; *Dayton* v. *Dulles*, 146 F. Supp. 876). On appeal, a division of the Court of Appeals, Judge Fahy dissenting, affirmed the judgment of the District Court (R. 304).

The majority of two judges below held that the grounds stated by the Secretary for the passport denial were sufficient to support such denial and that his reliance on undisclosed information in reaching his decision was lawful; the majority concluding, as follows (Appendix C, *infra*, p. 11): ". . . the problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the Courts cannot compel the Secretary to disclose information guarded by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care. We think we must follow that course."

Judge Fahy, dissenting, was of the opinion that the Secretary's "decisional basis" for the passport denial was "too broad when the particular national interest is not

broken down to come within the governing criteria" enunciated by Judge Fahy in his dissent in *Briehl* v. *Dulles*, —— U.S. App. D.C. ——, — F.2d —, June 27, 1957; that is, whether the passport denial was necessary "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs" (Appendix C, *infra*, pp. 11-13). Absent such specification by the Secretary, Judge Fahy was of the view that the Passport Regulations must be held to "lack all validity under present legislation" (*id.* p. 12).

Reasons for Granting the Writ

The Secretary of State has here barred an American citizen from travelling to another nation of the free world, there to advance his chosen profession. This the Secretary has done by application of one of the substantive standards recently prescribed in his Passport Regulations. Thus, there are presented the very issues posed by *Kent and Briehl* v. *Dulles*, No. 481, this Term (pending on petition for writ of certiorari), whose importance, the Government agrees, demands an authoritative adjudication by this Court.[3]

Beyond this, our case directly and inescapably involves special and important questions merely implicit in *Kent and Briehl*. There, the passport applicants had refused to execute affidavits as to past and present membership

[3] In *Kent and Briehl* v. *Dulles*, *supra*, the Solicitor General has not opposed the granting of certiorari, "in the light of the continuing importance of the issues presented and of the diversity of views of particular aspects of these questions expressed in the courts below" (Memorandum for Respondent). In a recent press conference, the Secretary himself spoke of the urgency of a ruling by this Court: ". . . the whole legal area as regards passports is somewhat in doubt, and there are pending a number of cases in the courts which, if they go up to the Supreme Court, will probably lead to some authoritative decision as to just what the functions and responsibilities of the Secretary of State are as regards passports . . ." (The New York Times, May 15, 1957, p. 10).

in the Communist Party; and passports were denied purportedly because of such refusal. Here, petitioner did execute such an affidavit, denying membership in the Communist Party at any time; and a passport was denied him, despite non-membership, because the Secretary concluded he had reason to believe petitioner was "going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement" *and* "because the issuance of a passport would be contrary to the national interest" (R. 278). These stated grounds for passport denial were at no point made more explicit or specific. Moreover, the Secretary's decision was based on confidential information disclosed neither to petitioner nor to the courts.

Consequently, whatever the Court's action in *Kent and Briehl, supra*, certiorari here is clearly warranted. For, whereas passports were denied in the earlier cases purportedly for procedural reasons and at the threshold of the administrative process; the denial in this case was based on the substantive standards of the Regulations and made after completion of the administrative proceedings: a requisite affidavit was executed, hearings were held, and findings and a determination were rendered by the Secretary. Review of this case would thus afford the Court an opportunity for that comprehensive consideration and definitive adjudication with respect to the passport policies and practices of the State Department, which, as the Government concedes, are most urgent.

The decision below squarely presents important questions of Federal law which have not been, but should be, settled by this Court; it conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F.2d 708; and, in our view, it reflects a misapplication of this Court's prior decisions and conflicts with other of the Court's applicable decisions.

1. In reaching the conclusions on which he bases this passport denial, the Secretary has admittedly relied, in vital part, on information, allegedly in State Department files, which he has refused to disclose either to petitioner or to the courts.[4] The majority below notes that this Court has never passed upon the precise question whether such reliance on undisclosed information to deny a citizen his right to travel abroad comports with due process (Appendix C, *infra*, pp. 5-6) and professedly shares with Americans their resentment and opposition to deprivation of liberty on the basis of undisclosed information (*id.*, p. 9). It feels compelled nevertheless to sanction so radical a course because of the "necessitous circumstances of public concern" (*ibid.*) and because the "cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area" (*id.*, p. 11).

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[4] The majority opinion below erroneously states that the Secretary disclosed the substance of this information to petitioner (Appendix C, *infra*, p. 9). This is not accurate. His "Findings and Decision" (R. 275-278) make it plain that he has relied on information whose nature and substance have *never* been disclosed.

The Secretary does purport to furnish the gist of the confidential information related to Findings I-IV (R. 276-277). There, he tells us what the confidential information "indicates" or (in Finding II) "establishes". In no instance does he supply the details or sources of the information. Nor are we advised to what extent the secret reports are derived from secret informants, whose names and veracity the Secretary admittedly himself sometimes does not know (see the stipulation in *Kamen* v. *Dulles*, D.D.C., C.A. No. 1121-55, dated June 6, 1955, which appears in Sen. Comm. on Judiciary, Subc. on Constit. Rts., 84th Cong., 1st sess., Hrgs. Nov. 15-16, 1955, pp. 92-93; and see, also, par. 4 of the affidavit of John Foster Dulles, dated Jan. 11, 1956, in *Boudin* v. *Dulles*, C.A.D.C., No. 13031).

With respect to Finding V of his Decision (R. 275), equally essential to the decision of passport denial, the Secretary, however, furnishes not even the gist of the confidential information to which he refers. Not even the slightest indication of what that information may be appears in the record.

a. The decisions on which the majority relies certainly do not support their holding. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304; and *Chicago and Southern Airlines* v. *Waterman S.S. Corp.*, 333 U.S. 103, concern the Executive's exercise of its foreign affairs functions. But, as the court below recognizes, "The issuance of a passport is not the conduct of foreign affairs" (Appendix C, *infra*, p. 10). Moreover, these and similar decisions, to the extent they sustain the Executive's reliance on undisclosed information, do so only insofar as such information is utilized for legislative or quasi-legislative determinations. They "do not involve individualized fact finding and classification, but legislative determinations [and] political judgments . . . ". *Gonzales* v. *United States*, 348 U.S. 407, 412, fn. 4; and see Davis, *The Requirement of a Trial Type Hearing*, 70 Harv. L. Rev. 193 (1956).

We are not here confronted with the use of secret information in connection with promulgation of regulations of general application, such as a bar to travel of *all* citizens to a particular geographical area, a function assimilable to the legislative process. Rather, we have confidential information here used in a particular factual adjudication relating to one individual citizen. Other research physicists presumably remain free to travel to India; petitioner alone is prohibited from doing so. And this because the Secretary has made findings and conclusions concerning petitioner *himself*; which characterize, stigmatize and adjudge him *alone* an individual bent on Communist activity abroad.

Resorting to secret information to brand a citizen ineligible for a passport and thus to impair his liberty of travel is plainly in violation of due process. *Morgan* v. *United States*, 304 U.S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 302-304; *Lloyd Sabaudo S.A.* v. *Elting*, 287 U.S. 329, 335-336; *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 288-

289.[5] Moreover, in this case, "in view of the stigma attached" to petitioner by the Secretary's findings and decision of passport denial, "the need for procedural safeguards seems even greater than in other cases". *Cole* v. *Young*, 351 U.S. 536, 546.

The majority below also invokes "common sense" in support of its holding (Appendix C, *infra*, p. 11). We submit, however, that the American mores would seem rather to dictate that no citizen be stigmatized, accused and shorn of his liberty on secret information and the *ipse dixit* of a Federal officer. As the President has put it: "In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." (Statement of President Eisenhower, Nov. 23, 1953, quoted in *Jay* v. *Boyd*, 351 U.S. 345, 374 (Douglas, J., dissenting).) We assume that a public officer is subject to at least the same code of conduct as is a private citizen. "Confrontation and cross-examination under oath are essential, if the American ideal under due process is to remain a vital force in our public life . . ." *Peters* v. *Hobby*, 349 U.S. 331, at 351 (Douglas, J., concurring).

b. The decision below is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F.2d 708. *Parker* concerned the rights of a seaman applying for a specially validated Coast Guard merchant mariner's document needed to enable him to

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[5] These decisions affecting property rights will be liberally applied to cases involving the personal liberty of movement. Cf. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206; see *Jencks* v. *United States*, 353 U.S. 657; *Peters* v. *Hobby*, 349 U.S. 331, 351-352 (Douglas, J., concurring); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 180 (Douglas, J., concurring); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 551 (Jackson, J., dissenting).

follow his calling; the instant case involves the rights of a citizen applying for a passport necessary so that he may pursue his vocation at a scientific institution in India.[6] The Ninth Circuit Court of Appeals struck down the Coast Guard regulations because they permitted reliance by the Coast Guard on data concealed from the seaman affected; because they consequently denied to the seamen their right of cross-examination; and because they contemplated decisions denying merchant mariner's documents on records containing facts unknown to the seamen and which they were unable to refute. Invalidating these screening regulations as a violation of due process, the Court held that "this system of secret informers, whisperers and tale bearers [is not] of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process" (227 F. 2d at 719-720).[7] See also, Judge Youngdahl's opinion in *Boudin* v. *Dulles*, 136 F. Supp. 218, modified 98 U.S. App. D.C. 205, 235 F. 2d 532.

These questions, squarely presented here, are plainly of such importance as to require an authoritative ruling by this Court.

2. This case also lays bare the utter ambiguity of the criteria which the Passport Regulations recently, and for the first time in our history, imposed for passport issuance.

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[6] That the two cases are counterparts is demonstrated by the provision in the State Department's regulations which exempts the travel of any seaman from the requirement of a passport if he possesses a "specially validated United States merchant mariner's document issued by the Coast Guard", the very document of clearance involved in *Parker*. 22 C.F.R. 53.3(c), as amended 22 F.R. 9215.

[7] The Government did not seek certiorari in the *Parker* case. It apparently has accepted the decision of the Circuit Court of Appeals; for it has revised its regulations to comport with the Court's ruling and has granted clearances to the seamen affected.

Petitioner's avowed purpose for travel abroad is to go to India, there to accept an appointment offered him as research physicist at the Tata Institute for Fundamental Research. The Secretary quite properly accepts petitioner's statement of purpose (R. 277). Nonetheless, he denies the passport application because he has "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and "because the issuance of a passport would be contrary to the national interest" (R. 278). There is neither specification of the activities in which the Secretary believes petitioner will engage; nor explanation of the manner in which such activities abroad, whatever they may be, will advance the Communist movement or affect the national interest.

This blatant ambiguity in the "decisional basis" of the Secretary led Judge Fahy to dissent from the decision below and to remark that, if the substantive criteria of the Passport Regulations are thus to be applied, one must conclude, as Judge Bazelon did in his dissent in *Briehl* v. *Dulles*, *supra*, that the Regulations lack "all validity under present legislation" (Appendix C, *infra*, pp. 12-13).

The standard applied to bar petitioner from travel (section 51.135 (c) of the Passport Regulations) is hopelessly vague. Who can define with any certainty the term "Communist movement"? Who can know what is meant by "advancement of the Communist movement"? Cf. *Watkins* v. *United States*, —— U.S. ——, 77 S.Ct. 1173, 1187, 1193; *Sweezy* v. *State of New Hampshire*, —— U.S. ——, 77 S.Ct. 1203, 1209-1210. The vagueness is compounded by use of the term "on the balance of all the evidence", since such "evidence" was never entirely revealed to petitioner, even as it is not revealed to any passport applicant. Equally ambiguous is the Secre-

tary's reference to "the national interest", which he says precludes the issuance of a passport to petitioner.

Such criteria afford no possibly meaningful guide for a citizen who wishes to maintain his liberty of travel or to regain such liberty once the Secretary has withdrawn it. Under such a formula, no one can possibly know what conduct on his part will render him ineligible for passport facilities.

The standards applied in this case consequently violate "the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Small* v. *American Sugar Refining Co.*, 267 U.S. 233, 238-240; see *Jencks* v. *United States*, 353 U.S. 657, 678 (Burton, J., concurring); *United States* v. *Hautau*, 43 F.Supp. 507 (D.N.J.). Such ambiguous criteria for government action are censurable and must be stricken particularly where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290.

The Secretary's reliance on standards so ambiguous and undefined and the perfunctory manner in which the majority below accepted them squarely raise additional important questions which require consideration and adjudication by this Court.

3. The Secretary's action here violates due process for the further reason that it posits the passport denial not on petitioner's own activities, or knowledge, or state of mind; but instead on his innocent association with persons whose activities the Secretary finds culpable. Such indifference to *scienter* is irreconcilable with the statement of the majority of the lower court in its *Briehl* opinion (slip op., p. 21): ". . . as we read the regulations, they refer to knowing associations with Communism". Clearly, the decision below in this case violates this Court's strictures in *Wieman* v. *Updegraff*, 344 U.S.

183; *Schware* v. *Board of Examiners,* 353 U.S. 232, 246; and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, and reflects a glaring application of the doctrine of "guilt by association".

Insofar as it is disclosed, the basis for the Secretary's decision of passport denial is (1) petitioner's activity in a Science for Victory Committee and association with its organizers in 1943-44; (2) his close association and relationship with Alfred Sarant in Ithaca, New York, during 1946-1950; (3) his presence in a New York apartment building in which Sarant had an apartment, during 1949 and 1950; and (4) his continuing close association with Bernard Peters, since 1938 (R. 276-277). The Secretary tells us that confidential information in State Department files "indicates" or "establishes" that this one organization and these named persons were, in one fashion or another, to a lesser or greater degree, involved in Communist Party affairs or in espionage. Whether or not such confidential information does in fact exist, whether or not it is reliable, whether or not it "indicates" or "establishes" what the Secretary says it does; there is, as we have already indicated, not the slightest suggestion either (1) that petitioner ever knew or had reason to know of these alleged wrongful activities of his associates, or (2) that he himself was ever a member of the Communist Party, or (3) that he himself at any point or to any degree ever engaged in any of the culpable activities referred to. Indeed, the evidence of record is all to the contrary (See *supra,* pp. 6-8).

Thus, the Secretary's findings, even if we accept them as true, are not a rational basis for concluding that petitioner was going abroad, in 1956, for the purpose of engaging in activities to advance the Communist movement; or that the issuance of a passport to him would in any way impair our national interest. The findings assume relevance only as they afford a basis for imputing to petitioner, notwithstanding his complete innocence and

lack of knowledge, the misconduct ascribed to his associates. The Secretary's decision of passport denial, which the majority below sustains, thus necessarily constitutes a flagrant application of the heinous doctrine of "guilt by association", a doctrine alien to our traditions and constitutional principles and "one of the most odious institutions of history". *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 178 (Douglas, J., concurring). Here is an example of that "[i]ndiscriminate classification of innocent with knowing activity [which] must fall as an assertion of arbitrary power". *Wieman* v. *Updegraff*, *supra*, 344 U.S. at 191; see, also, *Schware* v. *Board of Bar Examiners*, *supra*, and *Konigsberg* v. *State Bar of California*, *supra*.

4. In addition to these special questions, this case, as we have already noted (*supra*, p. 10), also presents the issues involved in *Kent and Briehl* v. *Dulles*, *supra*. A statement of those issues and the importance of their adjudication appears in the petition for a writ of certiorari filed in the *Kent and Briehl* case. There is no need for repetition here. In summary, those issues are, as follows:

a. Are the Passport Regulations and the decision of passport denial here valid in light of their abridgement of petitioner's First Amendment rights? Within the framework of the instant case, it is impossible to reconcile the Secretary's action with such rights of petitioner. As Judge Fahy points out, there is nothing in this record to demonstrate why a bar on petitioner's travel abroad is necessary "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs" (Appendix C, *infra*, pp. 12-13). The Secretary's belief that petitioner's activities will "advance the Communist movement" certainly does not subsume a claim that such activities will in any sense be unlawful or outside the protection of the First Amendment; there is

no reason to imply such a charge. Indeed, the Secretary finds (R. 277) that petitioner wishes to go abroad, as he has stated, to engage in research at the Tata Institute in Bombay; the record discloses no other purpose.

b. Is the passport denial, insofar as the Secretary's decision is grounded on petitioner's past conduct and associations antedating the promulgation of the Passport Regulations, valid in light of the inhibitions against bills of attainder and retroactive penal legislation enunciated in Article I, section 9 of the Constitution? See *Ex parte Garland*, 71 U.S. 333; *Cummings* v. *Missouri*, 71 U.S. 277.

c. Do the Passport Regulations exceed the statutory authority vested in the Secretary and are they in conflict with the Congressional intent expressed in pertinent legislation? If the Regulations are to be sustained, as the majority below would sustain them, by reliance on the provisions of 22 U.S.C. 211a and 8 U.S.C. 1185, serious constitutional problems arise; for neither of those statutes supplies any standards for the Secretary's substantive classification of citizens for passport issuance, and it is doubtful whether Congress could delegate such power of classification to the Executive branch without providing standards.

d. Is the absence of Congressional authorization, if such there is, cured by resort to so-called inherent powers of the President in foreign affairs and national security?

CONCLUSION

Although we are concerned here particularly with only one individual citizen, a physicist who desires to travel abroad in the interests of his professional advancement, the Passport Regulations and their application affect also the 700,000 citizens who annually apply to the State Department for passports. These Regulations represent the first effort by a Federal officer to establish a code of con-

duct by which a citizen's eligibility to travel abroad is to be judged. The Regulations have led to widespread criticism and concern [8] and to considerable litigation in the courts of the District of Columbia. The issues presented by this case are of vital importance to all citizens and to a proper administration of the Government's passport policy. They are unusual, complex and far-reaching issues, of a statutory, constitutional and practical nature, which have never before been adjudicated by this Court.

Because of these considerations and for the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Washington 5, D. C.
Attorney for Petitioner

November, 1957

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[8] See, for example: Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L.R. 853 (1954); Barnett, *Passport Administration and the Courts*, 32 Oregon L.R. 193 (1953); Wyzanski, *Freedom to Travel*, Atlantic Monthly, October, 1952; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A.B.A.J. 307 (1957); Jaffe, *The Right to Travel*, etc., 35 For. Affairs 18 (1956); Editorials: Chicago Daily Sun Times, November 26, 1955; New York Times, May 4, 1956; Denver Post, May 27, 1956; Washington Post, October 27, 1957.

Perhaps the most eminent critic of these passport policies is the former Secretary of State who himself promulgated the regulations of 1952; he characterizes them as "a grave mistake and a failure to foresee consequences which were inevitable." Acheson, *A Democrat Looks at His Party* (1955), p. 127.

The increasing concern of distinguished commentators is exemplified by such writings as O'Brian, *National Security and Individual Freedom* (1955), pp. 39, 48; Chafee, *Three Human Rights in the Constitution* (1956), pp. 162-214; Gellhorn, *Individual Freedom and Governmental Restraints* (1956), p. 15; Cushman, *Civil Liberties in the United States* (1956), pp. 113-116.

APPENDIX A

1. The pertinent sections of Title 22 of the United States Code are as follows:

> § 211a. *Authority to grant, issue, and verify passports.*—The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.
>
> § 212. *Who entitled to passport.*—No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

2. Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

> § 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) [There follow restrictions enumerated (1) through (7) not here pertinent.]
>
> * * * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

3. Title I, § 6 of the Internal Security Act of 1950, 64 Stat. 987, 993, 50 U. S. C. 785, as codified, is as follows:

(a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

4. The Expatriation Act of 1868, 15 Stat. 223, R.S. § 1999 is as follows:

Right of expatriation

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

5. The pertinent portions of the Regulations of the Secretary of State, as found in Title 22 of the Code of Federal Regulations, are as follows:

(a) Part 51 of Title 22, 1955 Supplement:

"§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Community [sic] party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant

the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement:

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136.* *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of

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* The provisions of Section 51.136 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date § 51.136 read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence,

to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board.*—(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135(b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.* *Applicability of Sections 51.137-51.142.* Except for action taken by reason of noncitizenship

* The provisions of Section 51.143 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date, § 51.143 read as follows:

"§ 51.143 *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

of geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151. *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152. *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153. *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154. *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155. *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156. *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board

and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearing shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168. *Transcript of hearings.*—A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record.

Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169. *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170. *Probative value of evidence.*—In determinnng whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

(b) Part 53 of Title 22 (as am'd. 22 F.R. 9216):

§ 53.2 *Limitations upon travel.*—No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States . . . , unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,717

WELDON BRUCE DAYTON,
Appellant,

v.

JOHN FOSTER DULLES, SECRETARY OF STATE,
Appellee.

October Term, 1957.

C.A. 4890-55

United States Court of Appeals for the District of Columbia Circuit

Filed Oct. 24, 1957

JOSEPH W. STEWART, *Clerk*

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Wilbur K. Miller, and Fahy, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Oct. 24, 1957.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Fahy.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13717

WELDON BRUCE DAYTON, APPELLANT

v.

JOHN FOSTER DULLES, Secretary of State, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided October 24, 1957

Mr. Harry I. Rand for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee.

Mr. Nathan H. David filed a brief on behalf of the Federation of American Scientists, as *amicus curiae*, urging reversal.

Before PRETTYMAN, WILBUR K. MILLER, and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This controversy concerns an application for a passport. It is now here upon a second appeal. Upon the first appeal[1] we applied the

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[1] Dayton v. Dulles, 99 U.S. App. D.C. 47, 237 F.2d 13 (1956).

rule we had laid down in the *Boudin* case[2] and remanded. The Secretary had rested his denial of the passport upon Section 51.135 of his Regulations[3] but without specification or findings sufficient to identify the subsection within which he classified Dayton. We held he must make such findings if his denial of the passport was to be sustained. Quoting from *Boudin* we further said that if the Secretary relied upon confidential information he must explain with such particularity as the circumstances permitted the nature of the reasons why this information might not be disclosed.

Upon the remand the Secretary rendered a Decision and Findings and again denied the passport. Upon representation the District Court granted the Secretary's motion for summary judgment and dismissed the complaint.[4] This appeal followed.

The decision and findings of the Secretary were divided into six sections. Each of the first four sections dealt with a specific activity of Dayton. They were similar in format. The first section, for example, dealt with his activity in a Science for Victory Committee and his association with two named persons in that organization. The Secretary found, on the open record, that this activity and association existed. Then he found, on the basis of confidential information in the files of the Department, that this Committee had been organized by Communist Party officials as a front for propaganda and espionage activities and that the named persons were Communist Party members. In the second section of his findings the Secretary dealt in precisely similar fashion with Dayton's association and relationship with another named person, "an active member of the Communist Party • • • in

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[2] Boudin v. Dulles, 98 U.S. App. D.C. 305, 235 F.2d 532 (1956).

[3] 22 C.F.R. § 51.135 (Supp. 1956).

[4] Dayton v. Dulles, 146 F.Supp. 876 (1956).

volved in the espionage apparatus of Julius Rosenberg." In the third section he recited his finding that Dayton was present on more than one occasion in the apartment building in which was the apartment used by Rosenberg "and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power." In the fourth section the Secretary found "a close association and relationship" with a person who "has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent."

In Section V of his findings the Secretary said:

> "I have reason to believe, on the balance of all the evidence, that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement. I have reached this conclusion on the basis of the foregoing findings together with the confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations."

Section VI of the findings is:

> "The confidential information referred to in paragraphs I(b), II(b), III(b) and IV(b) above relates to the internal security of the United States. The substance of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the

security and intelligence area; and might, with respect to information referred to in paragraph V, prejudice the interest of the United States foreign relations."

The conclusion of the Secretary was:

"The passport application of Weldon Bruce Dayton is therefore denied under Section 51.135(c) of the Passport Regulations (22 CFR 51.135(c)), and because the issuance of a passport would be contrary to the national interest."

The validity of the Regulations of the Secretary in respect to passports has been upheld by us in *Briehl* v. *Dulles*, decided June 27, 1957.[5] In the present case the Secretary conformed strictly to the requirements laid down by us in *Boudin* v. *Dulles* and upon the original appeal in this case. He made findings and identified the precise provision of the Regulations within which he found Dayton.[6] He said the substance of the confidential information relied on in Sections I, II, III and IV had been disclosed to Dayton.

The Secretary stated, clearly and succinctly, that he denied the passport because he had reason to believe, partly from the open record and partly from confidential information, that Dayton was going abroad to engage in activities which would advance the Communist movement. The issuance of the passport, said the Secretary, would be contrary to the national interest. Further the Secretary stated, also clearly and succinctly, his confidential information relates to the internal security of the United States and to disclose it would be detrimental to the

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[5] —— U.S. App. D.C. ——, —— F.2d ——.

[6] Section 51.135(c): "Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

national interest in respect to internal security and might prejudice our foreign relations.

Thus the case falls into two parts. The first question is whether the grounds stated by the Secretary are sufficient to support the denial of the passport. If it be true that Dayton was going abroad knowingly and wilfully to advance the Communist movement, could the Secretary refuse him a passport? That question was answered fully in *Briehl*. We there held he could refuse upon that ground.

It is true that the Secretary did not here say in specific terms that he denied the passport because to grant it would be detrimental to internal security or foreign relations. But surely, after all that has been said and done about the Communist movement by this Government, described by us in *Briehl*, it is obvious that the advance of that movement is detrimental to the internal security of this country and to its foreign relations. Clearly, when the Secretary, having made the finding as to Dayton's purpose, said that issuance of the passport would be contrary to the public interest, he meant the public interest in internal security and in foreign affairs. In the context of the record as it now is, in the light of the finding as to Dayton's purpose, "national interest" clearly means "internal security and foreign affairs". Any difference in meaning between those terms is of no moment here.

The second question is whether the Secretary could base his conclusion in this matter partly upon confidential information. Even if the ground for denial is valid, is the denial valid if the evidence which establishes the ground is confidential? The Secretary stated, as we have pointed out, that disclosure of this information would be detrimental to the national interest in respect to internal security and the conduct of our foreign affairs. Our view is that upon that basis he need not disclose the information but he may act upon it.

The Supreme Court has not passed upon the precise question here before us, *i.e.*, the permissible reliance upon

confidential information in a passport case. But we find helpful guideposts in the principles laid down by the Court in different fields. The right to engage in business and the right to enter into contracts are parts of the liberty protected by the Fifth and Fourteenth Amendments. No person can be deprived of those rights except by due process of law. The guiding principle in respect to them is well set out in the *West Coast Hotel* case.[7] There the Court had before it a minimum wage act. The attack was that the statute was a deprivation of freedom of contract, a part of the liberty protected by due process of law. "The principle which must control our decision is not in doubt," the Court said. "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and *regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.*"[8] (Italics supplied.) Quoting from its own opinion in *Chicago, B. & Quincy R.R. Co.* v. *McGuire*,[9] and referring to the freedom of contract, the Court said, "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[10] The Court upheld a limitation upon the freedom of contract, upon the ground that community interest required protection of the health of women and of a relatively helpless class of workers.

In respect to contracts in foreign trade and doing business abroad, the Court has consistently held that the right can be denied by the President upon the basis of confidential information, that he need not disclose that

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[7] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937).

[8] *Id.*, 300 U.S. at 391.

[9] 219 U.S. 549, 567, 55 L.Ed. 328, 31 S.Ct. 259 (1911).

[10] *Supra* note 7, 300 U.S. at 392.

information, and that the courts have no authority to inquire into it. In *United States* v. *Curtiss-Wright Corp.*[11] the Court had to determine the validity of a Joint Resolution which forbade the sale of munitions of war to persons in certain countries whenever the President proclaimed that the prohibition of such sales might contribute to the reestablishment of peace. The Court discussed at some length the use of confidential information in such matters.[12] It decided that embargo is within the area of foreign affairs, or at least may well affect foreign relations, and may well depend upon confidential information. The Court referred[13] to several earlier congressional resolutions authorizing the President to prohibit the exportation of coal and other materials. In *Panama Refining Co.* v. *Ryan*[14] the Court had described the executive power of embargo as "cognate to" the conduct of foreign relations. In a more recent case[15] the Court considered an order which denied a certificate for overseas air transportation. The order recommended by the Civil Aeronautics Board was changed by the President and then approved by him, pursuant to the statute. But the reasons for the changes were not disclosed beyond a statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion. The question was whether the courts could review such a determination by the President. The

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[11] 299 U.S. 304, 81 L.Ed. 255, 57 S.Ct. 216 (1936).

[12] *Id.*, 299 U.S. at 319-322.

[13] *Id.* at 325-327.

[14] 293 U.S. 388, 422, 79 L.Ed. 446, 55 S.Ct. 241 (1935).

[15] Chicago & Southern Air Lines v. Waterman Corp., 333 U.S. 103, 92 L.Ed. 568, 68 S.Ct. 431 (1948).

Supreme Court held they could not. The Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[16]

Thus the Court held that due process is not violated if the right to do business abroad is denied upon the basis of confidential information pertaining to foreign affairs.

Those cases involved commerce, more readily subject to regulation, or deprivation, than are the inherent rights of individuals. We do not suggest that the scope of due process in respect to commerce is the same as it is in respect to such other rights. But we think the principles laid down by the Court in the commerce cases for determining the extent of necessary due process are of assistance in testing the nature of the process necessary to the deprivation of an individual right such as the right to travel abroad.

We turn to the problem before us. The right to travel is a part of liberty. A person can be deprived of it only

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[16] *Id.*, 333 U.S. at 111.

by due process of law. A regulation of a liberty, reasonable in relation to its subject and adopted in the interest of the community, is due process. Travel abroad by some people for some purposes may under some circumstances involve our foreign relations or our national security. Travel abroad to advance the Communist movement is obviously, on its face, "cognate to" or may well affect our foreign affairs and our national security. Obviously a determination that a certain person wants to go abroad for the purpose of advancing the Communist movement may depend upon information gleaned from diplomatic or consular sources or from other sources abroad important to our well-being. Determinations made by Executive officials upon such information have traditionally, and by virtue of constitutional provisions relating thereto, been lodged in the Executive, and the confidence in which he has received that information has never been violated or even questioned by the legislative or judicial branches of the Government. We have before us a determination by the Secretary of State, based upon confidential information derived from sources available to him in the course of the performance of his duties, that a certain person intends to go abroad to advance the Communist movement. The Secretary disclosed to the person the substance of this confidential information. Upon the reasoning indicated in the foregoing paragraphs we conclude that this procedure satisfies the requirements of due process in such a matter. The community interest makes it necessary that this be so. The right to travel abroad may be denied upon that basis.

Americans always resent and oppose the deprivation of liberty upon the basis of undisclosed information. We do so in this area. We would not agree to it except in necessitous circumstances of public concern. Such circumstances are here.

In *Shachtman* v. *Dulles*[17] we emphasized that the

[17] 96 U.S. App. D.C. 287, 225 F.2d 938 (1955).

Government may not arbitrarily deny a passport and that the question is one of substantive due process. In doing so we cautioned:

> "What is arbitrary, however, in the sense of constituting a denial of due process, depends upon circumstances. [Citing cases.] Restraint upon travel abroad might be reasonable during an emergency though in normal times it would be arbitrary. World conditions, and those in particular areas, as to which the Executive has special information and on the basis of which he is especially qualified to make decisions, bear upon the question. For reasons thus suggested the issuance of passports throughout our history has been left to the judgment of the Secretary of State under Presidential regulation, and is subject only to constitutional safeguards. And even these must be defined with cautious regard for the responsibility of the Executive in the conduct of foreign affairs." [18]

And we further cautioned:

> "We must not confuse the problem of appellant's application for a passport with the conduct of foreign affairs in the political sense, which is entirely removed from judicial competence. For even though his application might be said to come within the scope of foreign affairs in a broad sense, it is also within the scope of the due process clause, which is concerned with the liberty of the individual free of arbitrary administrative restraint. There must be some reconcilation of these interests where only the right of a particular individual to travel is involved and not a question of foreign affairs on a political level." [19]

We adhere to those views. The issuance of a passport is not the conduct of foreign affairs. The Secretary does not have unfettered discretion in respect to it—nor does

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[18] *Id.*, 96 U.S. App. D.C. at 290-291, 225 F.2d at 941-942.

[19] *Id.*, 96 U.S. App. D.C. at 293, 225 F.2d at 944.

he claim it. His regulations specify the persons to whom he will not issue passports and indicate the reasons for such rules. They contemplate factual conclusions after opportunity is afforded the applicant for hearing. All this the Secretary has done. We have found his substantive regulations valid, and he has meticulously complied with ther The other question—not the grounds upon which the passport was denied but the evidence which established the grounds—is a different question. There the problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care. We think we must follow that course.

The judgment of the District Court is

Affirmed.

FAHY, *Circuit Judge, dissenting:* In the developing law growing out of litigation due to the fact that denial of a passport has the effect at this time of depriving a person of a right to travel he otherwise would have, *Shachtman* v. *Dulles*, 96 U.S. App. D.C. 287, 225 F.2d 938, I think this case requires still further consideration by the Secretary. In dissenting in *Briehl* v. *Dulles*, —— U.S. App. D.C. ——, I gave my reasons for the view that the Secretary has power to deny a passport though the applicant has the basic qualification of being a person who owes allegiance to the United States.[1] But I could

[1] I assumed that such an applicant also complied with the Regulations having to do with identity and other more or less formal or administrative matters.

find no greater power, either inherent in the Executive or delegated by the Congress, than to deny the passport when necessary "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs." And in all cases of denial procedural due process is required. Unless the authority is held within these bounds it seems to me the alternative is to say, as Judge Bazelon has said in his dissent in *Briehl*, that regulations embodying such substantive criteria as have been before us in recent passport cases lack all validity under present legislation.

I am convinced that the Congress has attempted foreign-travel control of individuals, and has not merely contemplated quarantining, as it were, certain areas. For example, 8 U.S.C. § 1185(b) (1952)[2] restricts the right of any citizen to "enter" as well as to "depart from . . . the United States" when "the United States is at war or during the existence of any national emergency proclaimed by the President." This attempted control should not be judicially nullified if it can be reasonably sustained consistently with the Constitution. As I said in my *Briehl* dissent, I think it reasonable to construe the Congressional exertion of control, together with the Executive authority in the area of foreign affairs, to extend to such control as is exercised, consistently with procedural due process, within the criteria stated in my *Briehl* dissent, but no further under existing law.

In the present case the findings of the Secretary and the Regulations applied by him were not framed within those criteria. I realize the weight of Judge Prettyman's opinion that the Secretary's action under section 51.135 (c) of the Regulations, and his reference to "the national interest," can be construed to bring the denial within the criteria to which I have referred, but it seems to me we should not be left thus to interpret the decisional basis

[2] 66 Stat. 190 (1952).

when the Secretary has not himself expressed it in terms of the authority he possesses. A finding that the denial is in the "national interest" is too broad when the particular national interest is not broken down to come within the governing criteria. The finding that appellant's travel would lead to activities knowingly engaged in to advance the Communist movement is subsidiary to the basic finding framed in terms of the "national interest." In other words, in denying this passport the issuing authority has not focused upon the question whether the grant would be likely to cause harm to national defense or to the conduct of foreign affairs. This is no doubt due to the fact that under the Regulations applied to this case the Secretary has not felt limited to the criteria which I think should govern his action.

While the court should not order the passport to be issued, I think the basis for the denial now before us is not within the terms of the authority available under existing law While my position, if it prevailed, would entail further delay this seems to me unavoidable in the process of working out legal solutions to the problems involved.